

No. 15149

United States  
Court of Appeals  
for the Ninth Circuit

---

WIEN ALASKA AIRLINES, INC.,

Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the  
Estate of MARTHA SIMMONDS, Deceased,  
for the Benefit of SAMUEL SIMMONDS and  
the Children of the Deceased, Namely: LEONA  
SIMMONDS, NELLIE SIMMONDS, DO-  
REEN SIMMONDS, ELI SIMMONDS,  
MARGARET SIMMONDS and ARNOLD  
SIMMONDS,

Appellee.

---

Transcript of Record

---

Appeal from the District Court  
for the District of Alaska,  
Fourth Division.

FILED

AUG 22 1956

PAUL P. O'BRIEN, CLERK



No. 15149

---

**United States  
Court of Appeals**  
for the Ninth Circuit

---

WIEN ALASKA AIRLINES, INC.,

Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the  
Estate of MARTHA SIMMONDS, Deceased,  
for the Benefit of SAMUEL SIMMONDS and  
the Children of the Deceased, Namely: LEONA  
SIMMONDS, NELLIE SIMMONDS, DO-  
REEN SIMMONDS, ELI SIMMONDS,  
MARGARET SIMMONDS and ARNOLD  
SIMMONDS,

Appellee.

---

**Transcript of Record**

---

**Appeal from the District Court  
for the District of Alaska,  
Fourth Division.**



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Clerk Re Notice of Appeal . . . . .	29
Answer to Amended Complaint . . . . .	12
Attorneys, Names and Addresses of . . . . .	1
Bond for Costs on Appeal . . . . .	30
Certificate of Clerk . . . . .	40
Complaint . . . . .	3
Complaint, Amended . . . . .	9
Court's Instructions . . . . .	21
Defendant's Requested Instruction No. 1 . . . . .	20
Judgment . . . . .	26
Memorandum Opinion . . . . .	15
Motion to Amend Complaint . . . . .	15
Motion Re Complaint, Defendant's . . . . .	7
Notice of Appeal . . . . .	29
Order on Defendant's Motion . . . . .	8
Order Denying Motion for New Trial . . . . .	28
Statement of Points on Appeal . . . . .	32
Statement of Points on Appeal and Designa- tion of Contents of Record on Appeal . . . . .	42
Stipulation Re Evidence . . . . .	31
Transcript of Argument on Motion to Dismiss the Action . . . . .	34
Transcript of Exceptions to Certain Instruc- tions to the Jury . . . . .	38
Verdict . . . . .	25



ATTORNEYS OF RECORD

ROBERT A. PARRISH,  
544½ Second Avenue,  
Fairbanks, Alaska,

Attorney for Plaintiff and Appellee.

CHARLES J. CLASBY,  
1000 Polaris Building,  
Fairbanks, Alaska,

Attorney for Defendant and Appellant.





In the District Court for the Territory of Alaska,  
Fourth Division  
No. 7524

SAMUEL SIMMONDS, Administrator of the  
Estate of Martha Simmonds, Deceased, for the  
Benefit of SAMUEL SIMMONDS, and the  
Children of the Deceased, Namely: LEONA  
SIMMONDS, NELLIE SIMMONDS, DO-  
REEN SIMMONDS, ELI SIMMONDS,  
MARGARET SIMMONDS and ARNOLD  
SIMMONDS,

Plaintiff,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

### COMPLAINT

Comes Now the above-named Plaintiff and for  
First Cause of Action against the above-named De-  
fendant complains and alleges as follows:

#### I.

That the Plaintiff is the duly appointed qualified  
and acting Administrator of the Estate of Martha  
Simmonds, Deceased.

#### II.

That the Defendant is now, and during all of the  
times herein mentioned, has been a corporation  
existing under and by virtue of the laws of the  
Territory of Alaska and engaged in business in the  
Territory of Alaska, with offices in Fairbanks,  
Alaska.

## III.

That the Defendant, during all the times herein-after mentioned was, and now is, engaged in business of a commercial and common carrier of passengers and freight by airplanes for hire, within the Territory of Alaska, and in and around the village of Barrow, Alaska.

## IV.

That on the 10th day of October, 1951, Martha Simmonds, Deceased, purchased of the defendant transportation by airplane from Meade River Coal Mine, Alaska, to Barrow, Alaska. That thereafter and on said date, the airplane of the defendant was flying from Meade River Coal Mine, Alaska, to Barrow, Alaska. That aboard said airplane as a passenger for hire was Martha Simmonds, Deceased. That said airplane was piloted by an employee of the defendant, one George Harrington, and was under its sole operation, direction and control.

## V.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane through the carelessness and negligence of the defendant crashed to the ground.

## VI.

That plaintiff states that at the time of her death the intestate left surviving her, himself as widower, and six children, namely: Leona Simmonds, age 8; Doreen Simmonds, age 6; Eli Simmonds, age 5;

Margaret Simmonds, age 4, and Arnold Simmonds, age 2½.

### VII.

Plaintiff further states that prior to the date of the accident, October 10, 1951, the said intestate had always been a healthy, robust woman; that she had always followed the occupation of housewife and mother of the children aforementioned; that she had at all times been in good health and performed her duties as housewife with high ability and efficiency, and was extremely competent in managing and caring for her children, and the home, and Plaintiff. That at the time of her death she was 27 years of age and had an expectancy of life of 36.56 years. That all the Plaintiffs have been totally deprived of the affection, society, companionship, and comfort of the said deceased as wife and mother and have been deprived of her care, service and comfort.

### VIII.

Plaintiff states that by reason of the loss and companionship of said wife on account of the negligence as aforesaid, that he has been damaged in the sum of Five Thousand (\$5,000.00) Dollars.

### IX.

Plaintiff further alleges that by reason of the negligence aforesaid, the children of Martha Simmonds, Deceased, have been deprived of the companionship, and motherly care and supervision of the said intestate, and Plaintiff is thereby damaged in the further sum of Ten Thousand (\$10,000.00) Dollars, for the benefit of the estate which Plaintiff

should have and recover, all of the aforesaid in the aggregate sum of Fifteen Thousand (\$15,000.00) Dollars.

Comes Now the above-named Plaintiff and for a Second and Alternative Cause of Action against the above-named Defendant complains and alleges as follows:

I.

Plaintiff realleges the allegations of Paragraphs I, II, III and IV of his First Cause of Action,

II.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane crashed on the ground by reason of the carelessness and negligence of the Defendant and its pilot as follows:

1. Failing to discern the altitude of the airplane and allowing it to fly into the ground.

III.

Plaintiff adopts the allegations of Paragraphs VI, VII, VIII and IX of his First Cause of Action.

Wherefore, Plaintiff prays judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, and for Plaintiff's costs and disbursements and a reasonable attorney fee.

/s/ ROBERT A. PARRISH,  
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed May 21, 1953.

[Title of District Court and Cause.]

## MOTION

Comes Now the above-named defendant and moves against the complaint of the plaintiff, now on file herein, as follows:

### I.

To make Paragraph VII of said complaint more definite and certain by alleging more particularly the phrase “\* \* \* expectancy of life of 36.56 years.”

### II.

To strike from Paragraph VII of said complaint the last sentence thereof, beginning with the words “That all \* \* \*” in the eighth line and extending to the end of said paragraph, upon the grounds and for the reason that the same is irrelevant and immaterial.

### III.

To strike all of Paragraph VIII from said complaint upon the grounds and for the reason that the same is irrelevant and immaterial.

### IV.

To strike from Paragraph IX of said complaint the words “have been deprived of the companionship and motherly care and supervision of the said intestate \* \* \*” upon the grounds and for the reason that the same is irrelevant and immaterial.

### V.

To dismiss said complaint for failure to state any damages recoverable from defendant.

## VI.

To like rule on said motion to make more definite and certain, and to strike, with reference to the same paragraphs as realleged in plaintiff's alternative cause of action.

Dated at Fairbanks, Alaska, this 28th day of July, 1953.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 28, 1953.

---

[Title of District Court and Cause.]

## ORDER

Whereas *plaintiff* above mentioned filed herein upon the 28th day of July, 1953, a motion to dismiss the complaint in this action for failure to state any damages recoverable from defendant, and further set forth other motions, to wit, to strike from said complaint, and to make more definite and certain; and

Whereas said motion came on for hearing upon the 4th day of September, 1953, the attorneys for the parties having stipulated to submit said motions to the court upon briefs at specified times; and

Said briefs having been duly filed in this cause,

It is hereby ordered and adjudged that said motions be denied, *plaintiff's* theory of recovery being consistent with the Alaska wrongful death statute, No. 61-7-3, A.C.L.A., 1949.

Done at Fairbanks, Alaska, this 30th day of December, 1953.

/s/ HARRY E. PRATT,  
District Judge.

[Endorsed]: Filed and entered December 30, 1953.

---

[Title of District Court and Cause.]

### AMENDED COMPLAINT

Comes Now the above-named Plaintiff and for First Cause of Action against the above-named Defendant, complains and alleges as follows:

#### I.

That the Plaintiff is the duly appointed qualified and acting Administrator of the Estate of Martha Simmonds, Deceased.

#### II.

That the Defendant is now, and during all of the times herein mentioned, has been a corporation existing under and by virtue of the laws of the Territory of Alaska and engaged in business in the Territory of Alaska, with offices in Fairbanks, Alaska.



## III.

That the Defendant, during all the times hereinafter mentioned was, and now is, engaged in business of a commercial and common carrier of passengers and freight by airplanes for hire, within the Territory of Alaska, and in and around the village of Barrow, Alaska.

## IV.

That on the 10th day of October, 1951, Martha Simmonds, Deceased, purchased of the Defendant transportation by airplane from Meade River Coal Mine, Alaska, to Barrow, Alaska. That thereafter and on said date, the airplane of the Defendant was flying from Meade River Coal Mine, Alaska, to Barrow, Alaska. That aboard said airplane as a passenger for hire was Martha Simmonds, Deceased. That said airplane was piloted by an employee of the Defendant, one George Harrington, and was under its sole operation, direction and control.

## V.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane through the carelessness and negligence of the Defendant crashed to the ground.

## VI.

That Plaintiff states that at the time of her death the intestate left surviving her, himself as widower, and six children, namely: Leona Simmonds, age 8; Doreen Simmonds, age 6; Eli Simmonds, age 5;



Margaret Simmonds, age 4, and Arnold Simmonds, age 21½.

Plaintiff further states that prior to the date of the accident, October 10, 1951, the said intestate had always been a healthy, robust woman, that she had always followed the occupation of housewife and mother of the children aforementioned; that she had at all times been in good health and performed her duties as housewife with high ability and efficiency, and was extremely competent in managing and caring for her children, and the home. and Plaintiff. That at the time of her death, she was 27 years of age and had an expectance of life of 36.56 years.

#### VIII.

That the said Martha Simmonds left her surviving, her widower, Samuel Simmonds the Plaintiff herein, and those children named in Paragraph VI thereof, each of whom are still living and by the death of said Martha Simmonds, as aforesaid, they were damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars. Wherefore, Plaintiff demands Judgment for damages in the amount of Fifteen Thousand (\$15,000.00) Dollars and for all other proper relief.

Comes Now, the above-named Plaintiff and for a Second and Alternative Cause of Action against the above-named Defendant complains and alleges as follows:

#### I.

Plaintiff realleges the allegations of Paragraphs I, II, III and IV of his First Cause of Action.

## II.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane crashed on the ground by reason of the carelessness and negligence of the Defendant and its pilot as follows:

1. Failing to discern the altitude of the airplane and allowing it to fly into the ground.

## III.

Plaintiff adopts the allegations of Paragraphs VI, VII and VIII of his First Cause of Action.

Wherefore, Plaintiff prays judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, and for Plaintiff's costs and disbursements and a reasonable Attorney fee.

/s/ ROBERT A. PARRISH,  
Attorney for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 7, 1954.

---

[Title of District Court and Cause.]

## ANSWER TO AMENDED COMPLAINT

Comes Now the defendant above named, and for answer to the Amended Complaint of Plaintiff, admits, denies, and alleges as follows:

First Cause of Action

I.

Defendant admits the allegations contained in Paragraphs I, II, and III of Plaintiff's First Cause of Action.

II.

For answer to paragraph IV of Plaintiff's First Cause of Action, Defendant, for want of sufficient information, denies that Martha Simmonds "purchased" of the Defendant transportation by airplane from Meade River Coal Mine, Alaska, to Barrow, Alaska, and admits each and every other allegation in said paragraph contained.

III.

Defendant admits that said airplane in its flight in the air was approximately three miles west of the village of Barrow, Alaska, when said airplane crashed to the ground; and specifically denies that said crash was through the fault, carelessness and negligence of the Defendant.

IV.

For answer to paragraphs VI, VII, and VIII of Plaintiff's first cause of action, Defendant does **not** have sufficient information from which to form a belief, therefore denies the same, and the whole thereof.

Second and Alternative Cause of Action

I.

For Defendant's answer to the reallegation by Plaintiff of the allegations in Paragraphs I, II,

III, and IV in his First Cause of Action, in Paragraph I of his Second and Alternative Cause of Action, Defendant adopts as its answer thereto its answer to said paragraphs.

## II.

For answer to paragraph II of said Cause of Action Defendant admits that said airplane in its flight in the air approximately three miles west of the village of Barrow, Alaska, crashed on the ground, and denies each and every other allegation in said paragraph contained.

## III.

For answer to paragraph III of said Second and Alternative Cause of Action Defendant adopts his answer to the paragraphs VI, VII and VIII of Plaintiff's first cause of action as above stated.

Wherefore, Defendant having fully answered the Complaint of Plaintiff, it prays that Plaintiff take nothing thereby, and that the same be dismissed with prejudice and with costs to the Defendant including a reasonable attorney's fee.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

### MOTION TO AMEND COMPLAINT

Comes Now, the above-named Plaintiffs, by and through their attorney, Robert A. Parrish, and respectfully move the Honorable Court as follows:

That Plaintiffs be permitted to amend their Complaint on file herein by interlineation changing the amount of the damages sought to be recovered from the sum of Fifteen Thousand (\$15,000.00) Dollars, to the sum of Fifty Thousand (\$50,000.00) Dollars. This motion is based upon the records and files of the above-entitled cause the reasons set forth in Plaintiffs' brief attached hereto.

Dated at Fairbanks, Alaska, this 19th day of September, 1955.

/s/ ROBERT A. PARRISH,  
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed September 19, 1955.

---

[Title of District Court and Cause.]

### MEMORANDUM OPINION

Before amendment in 1955, the Alaska wrongful death statute, Section 61-7-3, A. C. L. A., 1949, as amended by Chapter 89, S. L. A., 1949, gave to the personal representatives of the decedent an action

against the wrongful doer for damages; maximum recoverable damages were limited to \$15,000. The statute was amended by Chapter 153, S. L. A., 1955, and the amendment, in addition to increasing the maximum recoverable damages to \$50,000, specifically enumerates the elements of recoverable damages, many of which were not recoverable under the statute prior to the 1955 amendment.

This action was filed in 1953 in the name of the administrator of the estate of the decedent for the benefit of decedent's surviving husband and children. Damages in the amount of \$15,000 were sought. Claiming that the 1955 amendments are applicable to this action, plaintiff has moved for leave to amend the complaint by substituting in the prayer for damages the figure, \$50,000, for the figure, \$15,000.

The motion is denied. Section 19-1-1, A.C.L.A. 1949, amended by Chapter 4, E.S. 1955; *Field v. Witt Tire Co. of Atlanta, Ga., Inc., et al.*, 200 F. 2d 74 (2nd Cir. 1952). *Theodosia v. Keeshan Motor Express Co.*, 341 Ill. App. 8, 92 N.E. 2d 794, 1950.

The question of the measure of damages to be applied in this action has been raised and in an effort to clarify this matter for counsel prior to trial the court takes this opportunity to express its views.

Plaintiff argues that although the measure of damages in the case where there are no surviving statutory beneficiaries is the loss of benefit to the

estate, *Jennings v. Alaska Treadwell*, 170 Fed. 146 (9th Cir. 1909), where there are surviving statutory beneficiaries the damages recoverable are measured by the pecuniary loss sustained by the surviving statutory beneficiaries. He points to the Oregon wrongful death statute, Sec. 8-903, O.C.L.A., and to *Hansen v. Hays*, 175 Ore. 358, 154 P. 2d 202, indicating that under the Oregon statute where there are surviving statutory beneficiaries the measure of damages is the loss of pecuniary benefit to them, and where there are no surviving statutory beneficiaries the damages are the loss of benefit to the estate. Plaintiff then argues that where there are surviving statutory beneficiaries the Alaska statute, prior to its recent amendment, and the Oregon statute are nearly identical, and that the rule laid down in *Hansen v. Hays* should be followed.

Under the Alaska statute, prior to its amendment in 1955, where there are surviving statutory beneficiaries any sum collected is exclusively for their benefit and is distributed to them by the personal representative, plaintiff in the action, as though it were unbequeathed assets left in his hands, after the payment of all debts and expenses of administration. It is arguable that the recovery may be used for the payment of debts and expenses of administration since it is to be distributed as if it were unbequeathed assets, after the payment of debts and expenses of administration, but this interpretation is inconsistent with the provision that the



amount recovered is exclusively for the benefit of the surviving statutory beneficiaries, and the correct interpretation is that the recovery cannot be used for the payment of debts and expenses of administration, but it goes exclusively to the statutory beneficiaries except for the expenses of the action allowed by the court. This being true, the recoverable damages should be measured by the pecuniary loss suffered by the beneficiaries and not by the loss of benefit to the estate which in no way participates in the recovery.

This reasoning is bolstered by the fact that the Western States, with the possible exception only of New Mexico, uniformly follow the pecuniary loss to the beneficiaries rule. And the court has found no Alaska cases, nor have any been cited to it, which hold to the contrary. In fact, *Koske v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334, appears to support this reasoning, and see the able opinion by Judge Diamond in *Dralle v. Steele*, 13 Alaska 680 (1952) directly on this point. There is no indication that the decedent left surviving statutory beneficiaries in *Linge's Administrator v. Alaska Treadwell Co.*, 3 Alaska 9 (1906); *Jennings v. Alaska Treadwell Gold Mining Co.*, *supra*; *Caswell v. Copper River & N. W. Ry.*, 4 Alaska 709 (1913); *The Princess Sophia*, 35 F. 2d 736 (W. D. Wash. 1929), *aff'd* 61 F. 2d 339 (9th Cir. 1932); or *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365 (1943). And the Court of Appeals in the *Jennings* case



limited the benefit of estate rule to cases where the decedent left no surviving statutory beneficiaries:

“It is true that the two statutes are not identical as a whole, but the change in the Alaska Code from the Oregon code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates where the decedent left no husband, wife, or children. In such case the amount recovered should be administered as other personal property of the deceased person, as provided in the Oregon statute; that is to say, the amount received should be for the benefit of the estate, and the damage to the estate would therefore be the value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of the life of the deceased.”

The court will therefore apply in this action as the measure of damages the pecuniary loss to the statutory beneficiaries.

Dated at Fairbanks, Alaska this 30th day of November, 1955.

/s/ VERNON D. FORBES,  
District Judge.

[Endorsed]: Filed December 1, 1955.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTION No. 1

If you find for the plaintiff and against the defendant in this action, you must then determine the amount of damages which you believe the plaintiff is entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what the deceased would probably have earned by her intellectual or bodily effort of labor in her business or profession during the remainder of her life, which, to the extent of her net savings would have gone for the benefit of her estate. In determining this amount, you should consider her age, ability, disposition to labor, and her habits of living and expenditures and disposition to save.

If the husband of the deceased paid the expenses of her last illness and funeral expenses, or has obligated himself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages, the grief or anguish of the surviving relatives, including her husband and children, or the loss to the widower and children of the love and affection of the wife and mother and loss of the consolation of her presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow must not exceed the sum of \$15,000.00.

Respectfully submitted,

COLLINS and CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Defendants.

[Endorsed]: Filed December 5, 1955.

---

## COURT'S INSTRUCTIONS

### No. 2

This is an action brought under the Alaska wrongful death statute to recover damages for the death of Martha Simmonds caused by the crash of a Wien Alaska Airlines airplane on a flight from Meade River Coal Mine to Barrow on October 10, 1951. Under this statute the personal representative of the decedent is the plaintiff in the action and all damages recovered are exclusively for the benefit of the decedent's surviving spouse and children.

### No. 3

The following matters are to be considered as having been established in this action, either by stipulation of the parties or by uncontradicted testimony:

The plaintiff, Samuel Simmonds, is the duly appointed, qualified and acting administrator of the

estate of Martha Simmonds. On October 10, 1951, the defendant, Wien Alaska Airlines, was a common carrier operating an airline, and on that day Martha Simmonds was a passenger for hire on one of defendant's aircraft on a flight from Meade River Coal Mine to Point Barrow. This aircraft, which was under the exclusive control and management of the defendant, crashed near the village of Barrow, killing Martha Simmonds and the pilot, George Harrington, who was a duly licensed pilot.

Martha Simmonds is survived by her husband, Samuel Simmonds, and six children, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds.

#### No. 11

When, as in this case, the instrumentality which causes the injury is under the exclusive control and management of the defendant and the accident is such as in the ordinary course of things does not occur if the one having such control or management uses proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident occurred as a result of the failure of the defendant to use proper care.

#### No. 12

Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the evidence of negligence, either inferred from the happening of

the accident as aforesaid or otherwise proven, must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

If such a preponderance in plaintiff's favor exists, then you must determine whether such negligent conduct on the part of defendant was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendant's favor, or if in the jury's mind there is an even balance as between the weight of the evidence of negligence and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant.

#### No. 13

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.

#### No. 14

If under the court's instructions you find that plaintiff is entitled to a verdict, you will award such sum as, under all the circumstances of the case, compensates the surviving husband and children of Martha Simmonds for the pecuniary loss they have suffered by reason of her death; provided, however, you may not return a verdict for plaintiff in excess of \$15,000.

## No. 15

In determining that pecuniary loss, you may consider not only the financial support, if any, which the decedent's husband and children would have received except for her death, but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which decedent's husband and children have lost by reason of the death. In weighing these matters you may consider the age of the decedent and of decedent's husband and children; the state of health and the physical condition of the decedent and of decedent's husband and children as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies of life as shown by the evidence; the disposition of the decedent, whether it was kindly, affectionate or otherwise; whether or not she showed an inclination to contribute to the support of her husband and children, or any of them; the earning capacity of the decedent and of her husband and children, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection, which decedent's husband and children might have expected to receive from the decedent had she lived. With respect to the matter of life expectancies, you must keep this point in mind: If you decide for plaintiff, the prospective periods of time that will be of concern to you in determining the pecuniary loss of each beneficiary is only the shorter of the life ex-

pectancies of the decedent and that beneficiary, because manifestly one could derive pecuniary benefit from the life of the other only for the period that both would have lived.

### No. 17

The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it, and even if one or both of those conditions have existed, the mere right to receive support may have a pecuniary value and thus may be the basis of assessing damages against one who negligently has caused the death of the person from whom the support was due.

### No. 18

If you return a verdict for plaintiff, it shall be for a single sum, representing the aggregate of the pecuniary loss suffered by decedent's husband and children. In other words, if you return a verdict for plaintiff, you will not allocate the damages among decedent's husband and children.

---

[Title of District Court and Cause.]

### VERDICT No. I

We, the jury in the above-entitled cause, on the complaint find in favor of the plaintiff and assess damages at the sum of \$11,500.00 (Eleven Thousand Five Hundred Dollars).



Dated at Fairbanks, Alaska, this 7th day of December, 1955.

/s/ HAROLD A. WILLBANKS,  
Foreman.

[Endorsed]: Filed and entered December 8, 1955.

---

In the District Court for the District of Alaska,  
Fourth Division

No. 7524

SAMUEL SIMMONDS, Administrator of the  
Estate of MARTHA SIMMONDS, Deceased,  
for the Benefit of SAMUEL SIMMONDS, and  
the Children of the Deceased, Namely: LEONA  
SIMMONDS, NELLIE SIMMONDS, DO-  
REEN SIMMONDS, ELI SIMMONDS,  
MARGARET SIMMONDS and ARNOLD  
SIMMONDS,

Plaintiffs,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

### JUDGMENT

This Cause came on regularly for trial, plaintiff being present in Court and represented by his attorney, Robert A. Parrish, and the defendant being represented by its attorney, Charles J. Clasby, and



a jury having been duly empanelled and sworn to try the issues in the above-entitled cause and testimony and evidence having been submitted on behalf of plaintiff and defendant, and arguments of counsel for the respective parties to this action having been made, and the Court having instructed the Jury as to the law in the case, and the Jury having considered the law and the evidence duly returned into Court their Verdict of the 7th day of December, 1955, as a sealed Verdict on the 8th day of December, 1955, as provided by stipulation of the respective attorneys, and in words and figures, as follows:

Verdict No. I

We, the jury in the above-entitled cause, on the complaint find in favor of the plaintiff and assess damages at the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00).

Dated at Fairbanks, Alaska, this 7th day of December, 1955.

/s/ HAROLD A. WILLBANKS,  
Foreman.

[Endorsed]: Filed December 8, 1955, D.C.T.A.

Now, Therefore, in accordance with the Verdict of the Jury,

It Is Hereby Ordered, Adjudged and Decreed, that plaintiff shall have judgment against, and re-

cover from the defendant, Wien Alaska Airlines, Inc., the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00), and the sum of Six Hundred Dollars (\$600.00) as attorney's fees together with his costs and disbursements in the sum of \$1,083.68 Dollars as taxed by the Clerk of the Court, said Judgment to draw interest at the rate of 6 per cent per annum from the date hereof until paid.

Let execution issue hereon after ten (10) days.

Done at Fairbanks, Alaska, this 22nd day of December, 1955.

/s/ VERNON D. FORBES,  
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered December 22, 1955.

---

[Title of District Court and Cause.]

### ORDER

The plaintiff was represented by Robert A. Parrish; the defendant by Charles J. Clasby.

Mr. Clasby presented argument on the defendant's Motion for a New Trial. Mr. Parrish waived any argument. It was Ordered that the motion be denied.

Entered April 6, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF  
APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that Wien Alaska Airlines, Inc., defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 22, 1955.

COLLINS, CLASBY and  
SCZUDLO,

/s/ CHAS. J. CLASBY,  
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1956.

---

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that I mailed a copy of the Notice of Appeal filed by the defendant and appellant to the counsel of the plaintiff and appellee, pursuant to Rule 73-B, Rules of Civil Procedure, on the 2nd day of May, 1956.

Witness my hand and the seal of this Court this 17th day of May, 1956.

[Seal]     /s/ JOHN B. HALL,  
Clerk.

[Endorsed]: Filed May 18, 1956.

[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Whereas, the defendant in the above-entitled action, Wien Alaska Airlines, Inc., has this day filed with the District Court for the District of Alaska, Fourth Division, its notice of appeal from the judgment in the above-entitled action entered on December 22, 1955, in favor of the plaintiff;

Now, Therefore, in consideration of the premises and of such appeal, we, Wien Alaska Airlines, Inc., as principal, and Sigurd Wien and Fritz Wien, as sureties, do hereby undertake and promise, and do acknowledge ourselves bound unto the plaintiff in the sum of two hundred fifty and no one-hundredths dollars (\$250.00), conditioned for the payment of the costs on appeal if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Dated this 2nd day of May, 1956.

WIEN ALASKA AIRLINES,  
INC.,

Principal;

By /s/ SIGURD WIEN,  
President.

Attest:

/s/ RICHARD KING,  
Secretary.

/s/ SIGURD WIEN,

/s/ FRITZ WIEN,

Sureties.

Service of copy acknowledged.

[Endorsed]: Filed May 2, 1956.

---

[Title of District Court and Cause.]

### STIPULATION

It is stipulated by the parties to this cause by their respective counsel that at the trial of this cause the following occurred:

1. The plaintiff introduced evidence, properly objected to by defendant, establishing that decedent was survived by Samuel Simmonds, her husband, and Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds, her children; and that these persons were affected by the death of Martha Simmonds.

2. The plaintiff introduced no evidence on the theory that the proper measure of damages was the loss to the estate of Martha Simmonds as a result of her untimely death.

/s/ ROBERT A. PARRISH,

Attorney for Appellee.

COLLINS, CLASBY and  
SCZUDLO,

CHARLES J. CLASBY,

/s/ CHAS. J. CLASBY,

Of Counsel, Attorneys for  
Appellant.

Dated May 16, 1956.

[Endorsed]: Filed May 16, 1956.

---

[Title of District Court and Cause.]

### STATEMENT OF POINTS ON APPEAL

Comes now Wien Alaska Airlines, Inc., appellant herein, by its attorneys, Collins, Clasby and Sczudlo and Charles J. Clasby, and states that the points upon which it intends to rely in this appeal are as follows:

1. The court erred in denying defendant's motion to dismiss, filed July 28, 1953.

2. The court erred in admitting evidence of the loss suffered by the widower and children of the deceased individually.

3. The court erred in refusing to give defendant's requested instruction numbered 1.

4. The court erred in giving instruction numbered 3.

5. The court erred in giving instruction numbered 14.

6. The court erred in giving instruction numbered 15.

7. The court erred in giving instruction numbered 17.

8. The court erred in giving instruction numbered 18.

9. The court erred in overruling defendant's motion to dismiss, made at the close of the plaintiff's case.

10. The court erred in overruling plaintiff's motion for new trial.

The court erred in adopting, as the basis for recovery, the damages suffered by the widower and children of decedent rather than the loss resulting to decedent's estate by virtue of her death, which is the loss recoverable under the Alaska wrongful death statute and the cases construing the statute. Each of the errors stated above involves the trial court's ruling in the particular instance that the proper basis of recovery was the loss suffered by the named individuals instead of the loss suffered by the estate by reason of the death of Mrs. Simmonds.

COLLINS, CLASBY and  
SCZUDLO,

CHARLES J. CLASBY,

/s/ CHAS. J. CLASBY,

Of Counsel, Attorneys for  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 16, 1956.

In the District Court for the District of Alaska,  
Fourth Judicial Division

SAMUEL SIMMONDS, Administrator of the  
Estate of MARTHA SIMMONDS, Deceased,  
et al.,

Plaintiff,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

Appearances:

ROBERT A. PARRISH,  
Attorney for the Plaintiff.

CHARLES J. CLASBY,  
Attorney for the Defendant.

Fairbanks, Alaska.

December 6, 1955.

Before: Hon. Vernon D. Forbes,  
District Judge, and Jury.

TRANSCRIPT OF PART OF MR. CLASBY'S  
ARGUMENT ON MOTION TO DISMISS  
THE ACTION

Mr. Clasby: At this time we move that the action be dismissed. The basis for our motion is in most respects similar to that urged in our trial brief.

The other point we get back to again, and that is



pointed out in the trial brief, that this is an action by Samuel Simmonds, period. Look at the pleading. Look at it and see if you can find anywhere that this action is brought by an administrator. It is clear under our statute that the action must be maintained by the administrator.

The heading of this case is Samuel Simmonds, and he goes ahead and describes himself as administrator. The Court is familiar with cases that hold that where all you do is just describe yourself that that does not mean you are doing the thing in your official capacity. And you get down to allegation VIII, which is the only allegation in the complaint concerning the cause of action itself. It says: "That the said Martha Simmonds left her surviving, her widower, Samuel Simmonds, the Plaintiff herein, and those children named in Paragraph VI thereof, each of whom are still living and by the death of said Martha Simmonds, as aforesaid, they were damaged in the sum of Fifteen Thousand Dollars."

It states the children and the husband or widower, and the widower in that paragraph is named as the plaintiff.

It is clear from every case that has been called to the attention of the Court arising in Alaska under our wrongful death statute and under the statute itself that the action belongs to the administrator. The administrator must be the one that brings the suit. It is only incidental to that action in the event there is a surviving widower and children that the damages or amount recovered may be for their exclusive benefit, but it still does not change the neces-

sity that the administrator in his official capacity be the plaintiff and bring the action. In the Princess Sophia case the Court will recall there were foreign administrators attempting to bring the action, and it was ruled out, and that ruling was upheld in the Ninth Circuit. You had mothers and fathers and relatives within the class involved in our statute who also brought actions or filed claims, and the Court ruled that out, saying that the action had to be brought by the administrator, and the Ninth Circuit sustained that ruling, and the whole language of the opinion in the Princess Sophia case, both below and above, as well as Jennings vs. Treadwell, and the other cases we have cited to the Court, is that we don't have an action for the benefit of survivors in Alaska. The whole action is in the estate. It belongs to the estate. So we urge again at this particular point that the complaint itself is defective and it has not been proved by any evidence that has been introduced, and because the complaint fails to state a cause of action, we think the action should be dismissed.

The third ground for our motion is again the point we have urged on the Court several times, and that is that the measure of damages is the loss to the estate, and here there has been a failure of proof as to any loss to the estate. In that connection I won't go over the authorities that we have submitted to the Court prior to this in our brief but refer again to a brief survey of those authorities as they appear attached to Defendant's Requested Instruction No. 1, noting particularly that in the

Princess Sophia case there were children within the class that we have here involved, and the Court announced only one rule of recovery under the Alaska statute, and that is the loss to the estate. The fact that the money is distributed—and it is noted particularly it is distributed back in the probate court again, not up here or by the trial court—it is the probate court that sets aside the amounts of the costs of the action.

In the case of Kreidler vs. Ketchikan Spruce Mills, a trial without a jury, there were four children surviving. The Court reaffirmed the rule that had been announced in prior cases that the damage was limited to the estate, and gave them \$1,500, saying that the damages to the estate caused by the untimely death through the negligence of the defendant, measured by the value of decedent's life to the estate, "must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration."

That case preceded the re-enactment of our Act by Chapter 89 of the Session Laws of Alaska in 1949 and the Court is familiar with the authorities that the Legislature's re-enactment of an Act such as occurred here, where no change was made except in the amount, carries with it the judicial interpretations of the courts of jurisdiction at the time of re-enactment.

We also point out to the Court the recent case of Dralle vs. Steele, where Judge Dimond instructed in the case where a widow and a child survived that

the loss to the estate by the untimely death was the measure of recovery. A new trial was granted on a different point and at the time of the new trial Judge McCarrey instructed and followed Judge Dimond's instructions. Those instructions, of course, do run contrary to the printed opinion of Judge Dimond, evidencing a change in his mind as to the rule, as the printed opinion announced in connection with a motion. So it is our conclusion that the motion should be allowed and that the three grounds are well taken: First, that the complaint fails to state a cause of action; second, that there is no evidence of damages or loss as is contemplated in the rule applicable to losses in cases of this kind under the decided opinions by the Courts in Alaska. We have been unable to discover where the Ninth Circuit has indicated any different or contrary rule or any Court in Alaska has ever decided contrary to that rule.

December 7, 1955.

TRANSCRIPT OF DEFENDANT'S EXCEPTIONS TO CERTAIN INSTRUCTIONS OF THE COURT TO THE JURY

Mr. Clasby: May it please the Court, we object to the last paragraph of Instruction No. 3. We have heretofore stated the basis for such objections and we would like the record to show a repetition of those at this time.

We except to Instruction No. 14 and at the same time to the failure to give our requested instruction No. 1, and on the same basis that we have heretofore stated with respect to our motions, and the same exception is taken to Instruction No. 15 and also the same exception to No. 17 and No. 18.

Those are all based upon the citations we have heretofore given to the Court as to the rule of damages we believe to have been followed in Alaskan cases of this kind.

United States of America,  
Territory of Alaska—ss.

I, Esther M. Rasmussen, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages, numbered 1 to 6, inclusive, constitute a true and accurate transcript of that portion of my original shorthand notes taken at the time of the oral proceedings had upon the 6th and 7th days of December, 1955, in open Court in Cause No. 7524 Civil.

Dated at Fairbanks, Alaska, this 12th day of May, 1956.

/s/ ESTHER M. RASMUSSEN.

[Endorsed]: Filed May 16, 1956.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the list below comprises all proceedings in this cause listed on the Designation of Record of the defendant and appellant, and the Designation of Record of the plaintiff and appellee, viz.:

1. Complaint, filed May 21, 1953.
2. Motion of Defendant, filed July 28, 1953.
3. Minute Order Denying Above Motion.
4. Amended Complaint, filed July 7, 1954.
5. Answer to Amended Complaint.
6. Memorandum Opinion, dated November 30, 1955.
7. Defendant's Requested Instruction No. 1.
8. The Court's Instructions 3, 14, 15, 17, 18.
9. Transcript of Objection of the defendant to the above-listed instructions, and the refusal of the Court to give defendant's Instruction No. 1; also, dismissal denied.
10. Verdict, filed December 8, 1955.
11. Judgment, dated December 22, 1955.
12. Minute Order Denying Motion for New Trial.
13. Notice of Appeal, filed May 2, 1956.
14. Affidavit of Clerk re mailing.
15. Bond for Costs on Appeal.
16. Designation of Record of Appellant.
17. Stipulation Regarding Evidence.

18. Statement of Points on Appeal.
19. The Court's Instructions Nos. 2, 11, 12 and 13.
20. Plaintiff's Motion to Amend Complaint, filed September 19, 1955.
21. Designation of Record on Appeal of Plaintiff and Appellee.

Witness my hand and the seal of the above-entitled Court the 29th day of May, 1956.

[Seal]      /s/ JOHN B. HALL,  
Clerk of Court.

---

[Endorsed]: No. 15149. United States Court of Appeals for the Ninth Circuit. Wien Alaska Airlines, Inc., Appellant, vs. Samuel Simmonds, Administrator of the Estate of Martha Simmonds, Deceased, for the Benefit of Samuel Simmonds and the Children of the Deceased, Namely: Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed June 4, 1956.

      /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.



United States Court of Appeals  
for the Ninth Circuit

No. 15149

WIEN ALASKA AIRLINES, INC.,

Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the  
Estate of MARTHA SIMMONDS, Deceased,  
for the Benefit of SAMUEL SIMMONDS and  
the Children of the Deceased, Namely: LEONA  
SIMMONDS, NELLIE SIMMONDS, DO-  
REEN SIMMONDS, ELI SIMMONDS,  
MARGARET SIMMONDS and ARNOLD  
SIMMONDS,

Appellee.

STATEMENT OF POINTS ON APPEAL AND  
DESIGNATION OF CONTENTS OF REC-  
ORD ON APPEAL

Comes now Wien Alaska Airlines, Inc., appellant herein, by its attorneys, Collins, Clasby and Sezudlo, and Charles J. Clasby, and hereby adopts and incorporates herein by reference thereto the typewritten statement of points on appeal and designation of contents of record on appeal certified to this court by the Clerk of the District Court for the



Fourth Division, District of Alaska, in his transcript of the record of this cause.

COLLINS, CLASBY and  
SCZUDLO,

By /s/ CHAS. J. CLASBY,  
Of Counsel, Attorneys for  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1956.

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE